STATE OF MICHIGAN
IN THE SUPREME COURT

MARIE HUNT, Personal Representative
Estate of EUGENE WAYNE HUNT, Deceased,

Plaintiff-Appellant,

vs

DRIELICK, ET AL
Defendants-Appellants,
vs

EMPIRE FIRE AND MARINE
INSURANCE COMPANY,

Garnishee Defendant-Appellee.

BRANDON JAMES HUBER,

Plaintiff-Appellants,

vs

DRIELICK, ET AL
Defendants-Appellants,
vs

EMPIRE FIRE AND MARINE
INSURANCE COMPANY,

Garnishee Defendant-Appellee.

THOMAS LUCZAK and NOREEN LUCZAK,

Plaintiffs,

vs

DRIELICK, ET AL
Defendants-Appellants,
vs

EMPIRE FIRE AND MARINE
INSURANCE COMPANY,

Garnishee Defendant-Appellee.

MSC No. 146433
COA No. 299405
Lower Court No. 96-3280-NI-C

GARNISHEE DEFENDANT-APPELLEE EMPIRE FIRE AND MARINE INSURANCE COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CONSOLIDATED WITH:

MSC No. 146434
COA No. 299406
Lower Court No. 97-3238-NI-C

CONSOLIDATED WITH:

MSC No. 146435
COA No. 299407
Lower Court No. 96-3328-NI-C

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STATEMENT IDENTIFYING ORDER BEING APPEALED AND RELIEF REQUESTED

Garnishment Plaintiffs appeal from the Court of Appeals Opinion and Order issued on November 20, 2012, which held that the first part of the Business Use Exclusion in the Empire policy applies to exclude coverage for the underlying Judgments and therefore precludes the writs of garnishment. See ***Plt. Appx. 85a-94a***. The Court of Appeals ruling did not address whether coverage is barred under the second part of the Business Use Exclusion, which would be a separate, independent basis for reversing the trial court's erroneous ruling and affirming the Court of Appeals. On September 18, 2013, this Court issued an Order granting Garnishment Plaintiffs leave to appeal stating:

> The parties shall address: (1) whether a lease agreement is legally implied between Roger Drielick Trucking and Great Lakes Carriers Corporation [GLC] under the facts of the case and under applicable federal regulation of the motor carrier industry; and (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail policy) issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for " 'bodily injury' or 'property damage' ... while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented." ***Plt. Appx. p 546a***.

The public policy behind the Federal motor carrier regulations requiring a written lease is to prevent motor carriers from avoiding or insulating themselves from public liability for accidents involving trucks under lease which are used in furtherance of the motor carrier's business. Federal public policy dictates that a lease will be implied under such circumstances. However, whether a written lease agreement is legally implied under the facts of this case and applicable federal regulations is not dispositive of whether coverage is excluded under the second clause of the unambiguous Empire Business Use Exclusion. **The evidence in this case unequivocally establishes that an oral lease existed between Drielick Trucking and GLC**. **The second clause of the Empire Business Use Exclusion does not require a written lease**. The fact that federal

regulations governing interstate motor carriers require a written lease is legally irrelevant because the Empire Business Use Exclusion does not require a **written lease**. In the instant case, it is not necessary to imply the existence of a written lease because the evidence shows that **an oral lease existed between Drielick Trucking and GLC**, which is all that is required under the Empire Business Use Exclusion. The Drielick truck was under dispatch en route to pick up a load in the furtherance of the business of GLC, to whom it was leased, at the time of the accident. Therefore, coverage is excluded under the second clause of the Empire Business Use Exclusion. Nevertheless, the Court of Appeals did not err in resolving this case on the basis of the first clause in the Business Use Exclusion, which does not require a lease. Garnishee Defendant Empire requests that this honorable Court dismiss this appeal and affirm the Court of Appeals' decision.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD A LEASE BE IMPLIED BETWEEN DRIELICK TRUCKING AND GREAT LAKES CARRIERS BASED ON THE FACTS OF THIS CASE AND FEDERAL PUBLIC POLICY UNDERLYING APPLICABLE FEDERAL MOTOR CARRIER REGULATIONS?

Garnishee Defendant answers:	YES
Garnishment Plaintiffs answer:	no
Court of Appeals:	did not answer

II. WOULD IT HAVE BEEN PROPER FOR THE COURT OF APPEALS TO REVERSE THE TRIAL COURT'S ERRONEOUS RULING BASED ON THE SECOND PART OF THE BUSINESS USE EXCLUSION ON THE GROUNDS THAT COREY DRIELICK'S TRUCK WAS BEING USED IN THE BUSINESS OF GLC, TO WHOM IT WAS LEASED, AT THE TIME OF THE ACCIDENT?

Garnishee Defendant answers:	YES
Garnishment Plaintiffs answer:	no
Court of Appeals answered:	did not answer
Trial court answered:	no

III. DID THE COURT OF APPEALS PROPERLY REVERSE THE TRIAL COURT'S ERRONEOUS RULING THAT COREY DRIELICK'S TRUCK WAS NOT BEING USED TO CARRY PROPERTY IN A BUSINESS AT THE TIME OF THE ACCIDENT WITHIN THE MEANING OF THE FIRST PART OF THE EMPIRE "BUSINESS USE" EXCLUSION AND THAT THE EMPIRE POLICY WAS IN EFFECT AND APPLICABLE AT THE TIME OF THE ACCIDENT?

Garnishee Defendant answers:	YES
Court of Appeals answered:	YES
Garnishment Plaintiffs answer:	no

SUMMARY OF PROCEDURAL HISTORY AND BACKGROUND

Garnishment Plaintiffs[1] appeal from the November 20, 2012 published opinion of the Court of Appeals granting Garnishee Defendant Empire's appeal, reversing the trial court's erroneous ruling, and holding that the "Business Use" Exclusion in the Empire policy excludes coverage for the underlying Judgments and the writs of garnishment. See September 18, 2013 Order granting leave. ***Plt. Appx. p543a-546a.*** Garnishee Defendant Empire successfully appealed from an erroneous decision issued by the trial court following a 2004 remand from the Court of Appeals for further proceedings. These cases involve post-judgment garnishment proceedings in which Garnishee Defendant Empire filed a motion to quash the writs of garnishment. The trial court held that the Business Use Exclusion in the Empire Non-Trucking Insurance Policy was ambiguous and should be construed against Empire to provide coverage under the policy. **On 10/5/04, the Court of Appeals issued an Opinion reversing the trial court's erroneous decision, holding that the Business Use exclusion is unambiguous and must be enforced as written**, and remanding the cases to the trial court "to take evidence regarding the propriety of entering the writs of garnishment against [Garnishee] Defendant [Empire] based on the business use exclusion in the policy." See ***Plt. Appx. p 49a - 56a, 2004 COA Opinion***. **The only issues decided by the Court of Appeals in the November 20, 2012 Opinion was whether the unambiguous Business Use Exclusion applies to this case and excludes coverage for the writs of garnishment, rendering them invalid**. The Court of Appeals properly ruled that the Business Use Exclusion applies, reversed the trial court's erroneous ruling, and held that the exclusion precludes coverage and the writs of garnishment as a matter of law.

This post-Judgment garnishment action arises out of a motor vehicle accident on January

[1] Garnishment Plaintiffs refers to Plaintiffs, GLC, and Sargent Trucking, collectively.

12, 1996, involving a truck operated by Corey Drielick and motor vehicles occupied by Noreen Luczak, Eugene Hunt, and Brandon Huber ("Plaintiffs"). Corey Drielick worked as a truck driver for Drielick Trucking which is owned by his brother, Roger Drielick. **Drielick Trucking did not have operating authority to transport goods for hire. Therefore, Roger Drielick leased his trucks to motor carriers with operating authority, which used his trucks for commercial transportation purposes**. See ***Plt. Appx. p389a-424a.*** Roger Drielick testified that his trucks were leased to Great Lakes Carriers ("GLC") at the time of the accident. ***Plt. Appx. p389a-424a.*** GLC disputes this fact. However, **it is undisputed that at the time of the accident Corey Drielick was en route to pick up a loaded trailer from GLC's yard in Linwood for delivery to a business in Cheboygan pursuant to dispatch instructions from Bill Bateson, GLC's President/Owner/Dispatcher**.

The respective Plaintiffs each filed separate lawsuits against Drielick Trucking, Corey Drielick, GLC, and Sargent Trucking. The Plaintiffs alleged that the subject Drielick truck was under lease to either GLC or Sargent Trucking at the time of the accident, and as such, either GLC or Sargent was liable for Corey Drielick's negligence. Plaintiffs settled their lawsuits against GLC and Sargent Trucking for the following amounts: Estate of Eugene Hunt-$480,000; Noreen Luczak-$136,000; Brandon Huber-$21,000. These settlements were paid by Auto-Owners Insurance Company on behalf of GLC and Commercial Union Insurance Company on behalf of Sargent Trucking. They are not the subject of these post-judgment garnishment proceedings. Subsequent to the aforesaid settlements, the Plaintiffs entered into consent judgments with the Drielicks in the following amounts:

Estate of Eugene Hunt	$550,000
Noreen Luczak	$120,000
Brandon Huber	$50,000

Total $720,000[2]

See *Appx. p 251b-318b.*

GLC and Sargent Trucking entered into three "Assignment, Trust and Indemnification Agreements" with the Plaintiffs to share in any insurance proceeds recovered from Empire in payment of the consent judgments against the Drielicks. Empire issued a "**Non-Trucking**" insurance policy to Roger Drielick d/b/a Roger Drielick Trucking, Policy No. NT410920, (the Policy), which was in effect at the time of the accident. ***Plt. Appx. p. 454a-482a.*** **The Policy contains a "Business Use" exclusion which states that coverage does not apply "while a covered "auto" is used to carry property in any business or while a covered "auto" is used in the business of anyone to whom the "auto" is leased or rented."** ***Plt. Appx. P 454a-482a.***

On December 4, 2000, three writs of garnishment were issued against Empire on behalf of the Plaintiffs, GLC, and Sargent Trucking (collectively Garnishment Plaintiffs). ***Appx. p 251b-318b.*** The writs of garnishment, which are the subject of this Appeal, were issued for the purpose of collecting on the Drielick Consent Judgments based on Garnishment Plaintiffs' erroneous argument that the Empire policy provides coverage to the Drielicks for the accident and that as such, Empire is obligated to satisfy the writs of garnishment. The procedural history from 2001 to 2004 is detailed in Empire's Court of Appeals Brief.

On October 5, 2004, the Court of Appeals issued a per curiam Opinion reversing the trial court's erroneous ruling and holding that the language of the "Business Use" exclusion is unambiguous and must be enforced as written. ***Plt. Appx. p 49a-56a.*** The Court of Appeals concluded that there was an insufficient record to determine whether the subject truck was being used in the business of GLC within the scope of the Business Use exclusion at the time of the

[2] Garnishment Plaintiffs seek recovery of the $720,000 plus accumulated Judgment interest. As of 2010, they maintained that the total amount at issue with judgment interest is more than $1.2 million. The Empire policy limit is

accident and remanded the cases to the trial court for the limited purpose of taking "evidence regarding the propriety of entering the writs of garnishment against [Garnishee] Defendant [Empire] based on the business use exclusion in the policy." ***Plt. Appx. p 49a-56a.*** **The Court of Appeals 2004 Opinion implicitly acknowledged the validity and enforceability of the Business Use exclusion and merely instructed the trial court to determine whether the exclusion is applicable to bar coverage under the circumstances of these cases.** ***Plt. Appx. p 49a-56a.***

After the 2004 remand, the parties stipulated to submit proposed findings of fact and conclusions of law together with deposition testimony and other documentary evidence for the trial court to render a ruling as to whether the Business Use Exclusion applies to exclude coverage under the Empire policy and to issue a final decision on Empire's motion to quash the garnishments. Oral argument was heard on **9/21/07, three years after remand**. See ***Plt. Appx. p191a–244a; Appx. p251b-318b.*** The trial court took the matter under advisement for two years and issued an Opinion and Order on 8/18/09 holding that the Business Use exclusion was not applicable and denied Empire's motion to quash the garnishments. However, due to an oversight of the trial court, the 8/18/09 Opinion was not timely served on Garnishee Defendant Empire. The trial court later vacated the 8/18/09 Opinion and entered a new Opinion on July 12, 2010 as well as an Order denying reconsideration. See ***Plt. Appx. p63a-78a and 79a-84a.***[3] The 2010 Appeal in the Court of Appeals was taken from the July 12, 2010 Orders.

On November 20, 2012, the Court of Appeals issued a published Opinion reversing the trial court's erroneous ruling and holding that the Business Use Exclusion applies, Empire is not

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$750,000.

[3] The convoluted procedural history which led to vacating the 8/18/09 Opinion and entering the new orders on 7/12/10 is set forth in detail in Garnishee Defendant's Brief on Appeal in the Court of Appeals. The details are not relevant to

obligated to provide coverage, and the writs of garnishment are precluded as a matter of law. ***Plt. Appx, p 85a-94a***. The Court of Appeals based its ruling on the first clause in the Empire Business Use Exclusion. Garnishment Plaintiffs filed an application for leave to appeal to this Court, which was granted on September 18, 20134. ***Plt. Appx. p 543a-546a***. The 9/18/14 Order directs that:

> The parties shall address: (1) whether a lease agreement is legally implied between Roger Drielick Trucking and Great Lakes Carriers Corporation under the facts of the case and under applicable federal regulation of the motor carrier industry; and (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail policy) issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for " 'bodily injury' or 'property damage' ... while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented." ***Plt. Appx. p 546a***.

COUNTER-STATEMENT OF FACTS

EMPIRE "BUSINESS USE" EXCLUSION

The Empire policy provides coverage for personal "**NON-TRUCKING**" use of an insured vehicle. ***Plt. Appx. p 447a-482a*** The Empire policy, including the Liability Coverage Form, repeatedly states that it is insurance for "**NON-TRUCKING USE**". ***Plt. Appx. p 447A, 455a-456a***. This intent is also expressed in the Business Use exclusion, which states:

> **B. EXCLUSIONS**
> This insurance does not apply to any of the following:
> * * *
> 13. **BUSINESS USE**
> "Bodily injury" or "property damage" while a covered "auto" is used to carry property in any business **or** while a covered "auto" is used in the business of anyone to whom the "auto" is leased or rented. (Emphasis added.) ***Plt. Appx. p 457a-458a***.

The Business Use exclusion has two separate and distinct parts and **excludes coverage if either part applies**.

STATEMENT OF RELEVANT FACTS AND TESTIMONY

It is undisputed that Bill Bateson and Corey Drielick had a telephone conversation on the

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this Appeal.

morning of the accident, January 16, 1996, at which time Bateson dispatched Corey Drielick to pick up a loaded trailer at GLC's yard in Linwood, Michigan, for delivery to a business customer in Cheboygan, Michigan. ***Corey Drielick Transcript ("CD Tr"), Plt. Appx. p 250a, 252a-253a & Deposition Exhibits 7, 8, & 9, Plt. Appx. 286a-290a; Bill Bateson Transcript No. I ("BB Tr I"), Plt. Appx. p 373a; Bill Bateson Transcript No. II ("BB Tr II"), Appx. p 26b; Roger Drielick Transcript No. II 5/24/01 ("RD Tr II"), Plt. Appx. p 416a-417a.*** **Corey Drielick was en route to pick up the trailer pursuant to Bill Bateson's dispatch instructions when the accident occurred, which was 1-2 miles south of GLC's yard on M-13/US 23**. ***CD Tr, Plt. Appx. p253a; RD Tr II, Appx. p 417a.***

At the time of the accident, GLC was a trucking company with operating authority from both the State of Michigan and the Federal government/Interstate Commerce Commission (ICC)(n/k/a Dept of Transportation) to transport goods in both intrastate and interstate commerce. ***BB Tr I, Plt. Appx. p 368a; Jamie Bateson Transcript No. II ("JB Tr II"), Plt. Appx. p430a.*** GLC was located at 330 North Huron (M-13/US 23) in Linwood, Michigan. ***BB Tr II, Appx. p 16b; Jamie Batson Transcript No. I ("JB Tr I"), Appx. p 36b; BB Tr I, Plt. Appx. 368a.***

In 1995, Bill Bateson was the President of GLC. See 1995 Michigan Annual Report, ***Appx. 71b-74b***. He was also an owner and full-time employee of GLC in 1995 and early 1996 until he left the company when he and his wife separated in February 1996. ***BB Tr II, Appx. p20b, 30b; Applications signed by Bill Bateson, Appx. p 159b-168b***. He was in charge of GLC's day-to-day operations, which included dispatching drivers to pick up and deliver loads. ***JB Tr I, Appx. p36b; BB Tr II, Plt. Appx. p 369a.***

Roger Drielick owned Drielick Trucking, which operated three semi-trucks from September 1995 through February 1996, including the subject 1985 Freightliner, Truck No. 59,

which was involved in the accident. ***RD Tr II, Plt. Appx. p404a.*** At the time of the accident, Corey Drielick was employed as a truck driver for Drielick Trucking and was assigned to drive the subject truck. ***RD Tr II, Plt. Appx. p403a-404a.*** Drielick Trucking did not have operating authority from either the State of Michigan or the Federal government to operate its trucks for commercial transportation purposes and had to lease the trucks to a motor carrier with operating authority for use in the lessee's business. ***RD Tr II, Plt. Appx. p404a, 407a.*** Drielick Trucking received a percentage of the revenue for each load that it delivered with its trucks on behalf of the lessee. ***RD Tr II, Plt. Appx. p404a.***

Great Lakes Logistics ("GLL") is allegedly a broker reportedly in the business of hiring other independent trucking companies to transport loads for customers of GLL. ***JB Tr II, Plt. Appx. p431a.*** **GLL did not have any employees, did not have its own telephone number or phone book listing, was located in the same building as GLC, and did not have any sign or identification on the building**. ***JB Tr II, Plt. Appx. p 431a, 433a; BB Tr I, Plt. Appx. p370a.*** **In other words, GLL merely existed on paper and was an alter ego of GLC**.

Sargent Trucking is a trucking company which had a local office in Saginaw, Michigan, in 1995 and 1996. Kevin Beech was Sargent's dispatcher in the Saginaw office. ***BB Tr I, Plt. Appx. p 371a; BB Tr II, Appx. p 20b; Amy Howlett Transcript ("AH Tr"), Appx. p 53b.*** Sargent Trucking had operating authority from both the State and Federal government to transport goods for hire. ***AH Tr, Appx. p 54b-55b.***

There is a dispute about whether the truck involved in the accident was leased to GLC, GLL, or Sargent Trucking at the time of the accident, which is immaterial and irrelevant with respect to whether the Business Use exclusion in the Empire policy bars coverage for the accident. Regardless of whether the Drielick truck was under lease to GLC or Sargent, Corey Drielick was

on dispatch en route to pick up a load at the GLC yard at the time of the January 1996 accident, and as such, coverage is excluded under Empire's non-trucking policy. It should be noted that the underlying consent judgments against the Drielicks were already paid under GLC's Auto-Owners policy and Sargent Trucking's Commercial Union policy. See Auto-Owners policy, BMC-90 Motor Carrier Liability Endorsement, ***Appx. p 171b-224b*** and Commercial Union policy, Motor Carrier Liability Endorsement, ***Appx. p 225b-250b***. The Motor Carrier Liability Endorsement is mandated by federal law. In other words, the exclusion of coverage under the Empire policy will not deprive the original Plaintiffs of their recovery, which they have already received.

ROGER DRIELICK

Because Drielick Trucking did not have its own independent operating authority, Roger Drielick knew his trucks could not be used commercially to transport goods for hire unless they were leased to a motor carrier (lessee) with operating authority. ***RD Tr II, Plt. Appx. p 407a.*** On September 11, 1995, Roger Drielick leased his three trucks to Sargent Trucking for an initial one year period. ***RD Tr II, Plt. Appx. p 408a***; ***Appx. p75b-78b***. However, Roger Drielick orally terminated the lease agreements with Sargent after approximately one month. ***RD Tr II, Plt. Appx. p408a-409a***. This fact is confirmed by the testimony of Amy Howlett of Sargent Trucking. ***AH Tr Appx. p52b, 61b, 65b-66b, 69b***. Roger Drielick terminated the Sargent lease at the suggestion of Bill Bateson from GLC. ***RD Tr II, Plt. Appx. p409a***. Bateson told Drielick that he owned GLC and that Drielick Trucking could make more money driving for GLC. ***RD Tr II, Plt. Appx. p409a-410a***. In reliance on Bateson's representations, Drielick informed Sargent Trucking that he was terminating his lease agreements. ***RD Tr II, Plt. Appx. p410a***.

Drielick subsequently leased his three trucks to GLC. ***RD Tr II, Plt. Appx. p 410a***. At no time, by word or deed, did Bateson ever inform Drielick that he did not have GLC's authority to

lease the trucks or that his wife, Jamie Bateson, had sole authority for lease agreements. ***RD Tr II, Plt. Appx. p 410a***. To the contrary, **Bateson told Drielick that he would take care of preparing the written lease agreements and asked Drielick for a copy of his old lease with Sargent Trucking to use as a format for the new lease**. ***RD Tr II, Plt. Appx. p 411a***. Drielick never spoke with Bill Bateson's wife and business partner, Jamie Bateson, and was unaware that she had any involvement with GLC prior to the accident.[4] ***RD Tr II, Plt. Appx. p 412a***. All of Roger Drielick's contacts with GLC were with Bill Bateson or Mario, the other dispatcher for GLC. **RD Tr II, *Plt. Appx. p 412a.***

After terminating the leases with Sargent Trucking, Drielick Trucking started hauling loads for GLC in November 1995 even though the written lease agreement had not been finalized. ***RD Tr II, Plt. Appx. p 410a***. Drielick asked Bateson many times about the status of the written lease because he knew that he was supposed to carry a copy of the lease in the truck. ***RD Tr II, Plt. Appx. p411a***. Bateson repeatedly told Drielick that he would take care of the lease. ***RD Tr II, Plt. Appx. p 411a***. Contrary to Bateson's assurances, he never prepared a written lease. ***RD Tr II, Plt. Appx. p 419a***. However, Bateson did give Drielick a copy of GLC's Certificate of Operating Authority ("cab card") from the Michigan Public Service Commission ("MPSC") and told him to keep it in the trucks. ***RD Tr II, Plt. Appx. p p411a-412a, 419a***. See also Cab Card, ***Appx. p 169b-170b.***

Bateson also instructed Drielick to have decals with GLC's name and permit number placed on each of the Drielick trucks, which is required by Federal regulations. [5] ***Roger Drielick Transcript I 2/15/99 ("RD Tr I"), Plt. Appx. p 392a; RD Tr II, Plt. Appx. p*** **412a**. Bateson gave Drielick a set of decals for one truck, sent him to Speedway Graphics to have decals made for one

[4] The Batesons have since split up and divorced.

of the Peterbuilt trucks, and told him to have decals made for the subject 1985 Freightliner. ***RD Tr I, Plt. Appx. p 393a, 397a; RD Tr II, Plt. Appx. p 412a-413a.*** GLC's name and permit number was on the side of all three Drielick trucks, including the subject truck, at the time of the January 1996 accident. ***RD Tr II, Plt. Appx. p 412a.*** See also Photographs, ***Appx. p 81b-84b.*** **From November 1995 through the day after the January 16, 1996 accident, the Drielick trucks received dispatches from GLC through Bill Bateson and/or Mario to transport numerous loads for GLC.** ***RD Tr I, Plt. Appx. p 394a; RD Tr II, Plt. Appx. p 413a, 415a, 418a.*** During that time, Bill Bateson saw the Drielick trucks with the GLC decals in the GLC yard on many occasions and never once said anything about them to Roger Drielick or indicated that the decals should not be on the Drielick trucks. ***RD Tr II, Plt. Appx. p 413a.***

Bateson also provided Roger Drielick with printed forms containing GLC's name and address for the Drielick Trucking drivers to fill out and use as delivery receipts after picking up each load. ***RD Tr II, Plt. Appx. p 413a-414a. BB Tr II, Appx. p 29b.*** The only dates for which GLC produced delivery receipts for loads delivered by Drielick Trucking on behalf of GLC are for the period from December 9, 1995, through January 13, 1996. ***Appx 85b-112b. RD Tr II, Plt. Appx. p 414a.*** These forms **do not** represent all of the loads delivered by Drielick Trucking for GLC from November 1995 through January 13, 1996.

Drielick Trucking also prepared billing invoices for the loads it delivered for GLC. See ***Appx. p 113b-118b.*** GLC's name appears at the top of these invoices. The only available Drielick Trucking invoices for loads delivered for GLC are dated from November 15, 1995 through December 23, 1995. ***Appx. p 113b-118b; RD Tr II, Plt. Appx. p 414a-415a.*** **Although the records of delivery receipts and invoices are incomplete, when viewed together, they clearly**

[5] See 49 CFR § 1057.11(c) (1995), 49 CFR §376.11(c)(1) (1996).

establish that Drielick Trucking was hauling loads for GLC from November 15, 1995 through January 11, 1996. ***Appx. p 85b-112b; Appx. p 113b-118b***. There is no delivery receipt or bill of lading for the load Corey Drielick was en route to pick up at the time of the January 16, 1996 accident because the accident occurred before he picked up the load. ***RD Tr II, Plt. Appx. p 414a; CD Tr, Plt. Appx. p 258a; BB Tr II, Appx. p29b***. The delivery receipt would not have been filled out until the Corey picked up the load. There is no invoice to GLC from Drielick Trucking for January 16, 1996 because no invoice would be sent until after the delivery was completed. ***Plt. Appx. p 389a-398a; Plt. Appx. p 399a-424a***. Since the accident occurred while Corey Drielick was on dispatch en route to pick up the load, and the delivery was not made, Drielick did not bill GLC for the January 16, 1996 trip.

Based on the **oral lease agreement** between Roger Drielick and GLC (through Bill Bateson), Drielick Trucking was paid 75% of the revenue for each load delivered on behalf of GLC. ***RD Tr II, Plt. Appx. p 415a-416a***. Bill Bateson signed several of the checks issued to Drielick Trucking for the delivered loads. ***RD Tr II, Plt. Appx. p 415a***. See also ***Appx. p 147b-158b***. Although the majority of the checks made out to Drielick Trucking for the loads delivered for GLC were drawn on an account in the name of GLL, Roger Drielick did not know anything about GLL and was **never told that there was any difference between GLC and GLL**. ***RD Tr II, Plt. Appx. p 417a***. There was at least one check drawn on GLC's account. See ***Appx. p 147b-158b***. The checking account through which GLC paid Drielick Trucking was irrelevant to Roger Drielick because all of the loads were delivered for GLC pursuant to GLC's operating authority. ***RD Tr II, Plt. Appx. p 415a***. GLL did not have any operating authority.

Roger Drielick was never told by Bateson or anyone else that the loads Drielick Trucking delivered from November 1995 to January 1996 were being brokered/assigned to

Sargent Trucking to deliver under their operating authority. ***RD Tr II, Plt. Appx. p 417a-418a.*** **The reason for this is that the loads were not brokered to Sargent and were not delivered under Sargent's operating authority**. See ***AH Tr, Appx. p 52b, 61b, 65b-66b, 69b.*** **The loads were being delivered for GLC under its operating authority**. ***Plt. Appx. p 389a-398a; Plt. Appx. p 399a-424a.***

On the day of the January 1996 accident, the lease agreement between GLC and Drielick Trucking was in effect. ***RD Tr II, Plt. Appx. p 406a.*** Roger Drielick was in Kentucky that day delivering another load for GLC. ***RD Tr II, Plt. Appx. p 416a.*** At the time of the accident, Corey Drielick was en route to pick up a load at GLC's yard in Linwood, Michigan pursuant to dispatch instructions he had received from Bill Bateson. ***RD Tr II, Plt. Appx. p 416a.*** The accident occurred on M-13/US 23 about 1-2 miles south of GLC's yard. ***RD Tr II, Plt. Appx. p 416a-417a.*** GLC typically dispatched Drielick's drivers to pick up the loads at the GLC yard. ***RD Tr II, Plt. Appx. p 417a.*** The subject truck was under dispatch to GLC at the time of the accident because it was en route to pick up a load at the direction of GLC pursuant to a telephone conversation between Bill Bateson and Corey Drielick. ***RD Tr I, Plt. Appx. p 395a.*** See also ***Plt. Appx. p 245a-290a.***

Roger Drielick testified that he does not believe the Empire policy provides coverage when the truck is under dispatch to the carrier even if the truck is "bobtailing" without a trailer. ***RD Tr I, Plt. Appx. p 395a.*** Drielick Trucking stopped hauling for GLC immediately after the accident, and the Drielick trucks were again leased to Sargent Trucking in February 1996. ***RD Tr I, Plt. Appx. p 395a; RD Tr II, Plt. Appx. p 418a.*** See also, ***2/14/96 Lease, Appx. p 79b-80b.***

Sometime after the accident, Roger Drielick met with Bill and Jamie Bateson to discuss the accident. **The Batesons never told him that the subject truck was not under lease to GLC or**

that they believed the Drielick trucks were still under lease to Sargent Trucking. ***RD Tr II, Plt. Appx. p 412a, 418a***. The Batesons' primary concern was that the Drielick trucks were not specifically identified in GLC's insurance policy. ***RD Tr II, Plt. Appx. p 418a***. In reality, **Drielick's trucks were covered by GLC's Auto-Owners insurance policy pursuant to the FORM BMC-90 Endorsement for Motor Carrier Policies of Insurance for Automobile Bodily Injury and Property Damage Liability under Section 10927, Title 49 of the United States Code (ICC Endorsement), which is mandated by Federal law**.[6] See Form BMC-90 in Auto-Owners policy, ***Appx. p 171b-224b***. The ICC Endorsement obligates an insurer to provide coverage for any truck owned or leased by the insured as a matter of law. The Batesons' concern about whether Drielick's trucks were covered by GLC's Auto-Owners insurance policy precipitated the concoction of their sham argument that the loads delivered by Drielick were brokered by GLL to Sargent Trucking, which is unsupported by the evidence.

COREY DRIELICK

Corey Drielick began working as a truck driver for his brother's trucking company shortly after Roger bought the subject 1985 Freightliner. ***CD Tr, Plt. Appx. p 250a***. The truck was initially leased to Sargent Trucking during which time Corey hauled loads for Sargent Trucking, all of which were dispatched by Kevin Beech. ***CD Tr, Plt. Appx. p 248a***. During that time, Corey Drielick testified that he may have used the truck once or twice on weekends to haul equipment for a friend, Dave Stanley. ***CD Tr, Plt. Appx. p 247a-248a, 259a***. There is no evidence that Roger Drielick was aware of Corey's use of the truck on the weekends or that he authorized it. **Regardless, Corey was on dispatch for GLC at the time of the accident**.

[6] 49 CFR. §1043.1(a)(1995); 49 CFR §387.7(1996). See also *Prestige Casualty Co* v *Michigan Mut Ins Co*, 99 F.3d 1340 (CA 6 1996).

Corey Drielick stopped making deliveries for Sargent Trucking about two to four months before the subject accident when his brother, Roger, terminated the lease with Sargent and leased the trucks to GLC, **after which Corey delivered loads exclusively for GLC**. ***CD Tr, Plt. Appx. p 258a, 259a.*** Corey never used the truck to make deliveries for any motor carriers other than Sargent Trucking and GLC. ***CD Tr, Plt. Appx. p 248a.***

Whenever Corey delivered a load for GLC, he filled out a delivery receipt on a form he was given by GLC, which was returned to GLC after the load was delivered. ***CD Tr, Plt. Appx. p 251a, 252a.*** See delivery receipts, ***Appx. p 85b-112b.*** See also ***CD Tr, Plt. Appx. p 251a.*** Corey Drielick did not know the specific arrangements between Drielick Trucking and GLC with respect to payment for loads delivered. ***CD Tr, Plt. Appx. p 252a.*** Corey's mother, Delynne Drielick, handled the bookkeeping. ***CD Tr, Plt. Appx. p 252a.***

On January 16, 1996, the day of the accident, there was a telephone conversation between Corey Drielick and Bill Bateson, the GLC dispatcher who always called Corey when he needed loads delivered for GLC. ***CD Tr, Plt. Appx. p 250a-251a.*** Bateson dispatched Corey to pick up a loaded trailer at GLC's yard and deliver it to Cheboygan, Michigan. ***CD Tr, Plt. Appx. p 250a-251a.*** Corey left his mother's house, where he kept the truck, at about 11:30 a.m., at which time his girlfriend rode with him to keep him company, which she had done on several prior occasions when Corey made delivery runs for GLC. ***CD Tr, Plt. Appx. p 252a.*** Corey drove the truck north on M-13 to east Birch Run Road to northbound I-75 to the Wilder Road exit (M-13) and headed north toward the GLC yard in Linwood. ***CD Tr, Plt. Appx. p 253a.*** **COREY DID NOT STOP OR MAKE ANY DETOUR FOR PERSONAL BUSINESS ON THE WAY TO THE GLC YARD**. ***CD Tr, Plt. Appx. p 253a.*** He was on M-13 just south of the GLC yard when the accident occurred. ***CD Tr, Plt. Appx. p 253a.*** Corey did not have any paperwork for the load because the

accident occurred while he was en route to GLC to pick up the load. ***CD Tr, Plt. Appx. p 259a.*** Bill Bateson acknowledged that Corey would not have had any paperwork for the load at the time of the accident because the driver does not receive the paperwork until he picks up the load at GLC's yard. ***BB Tr II, Appx. p 29b.***

The truck was "bobtailing" without a trailer at the time of the accident. Corey testified that the trip begins at the time he receives dispatch instructions and physically leaves to pick up the load. ***CD Tr, Plt. Appx. p*** 262a. **It is undisputed that Corey was en route to pick up the load pursuant to Bateson's verbal dispatch instructions at the time of the accident**.

After the accident, Bill Bateson instructed Corey to drive the truck to GLC's yard. ***CD Tr, Plt. Appx. p 257a-258a.*** Corey left his log book in the truck and has not seen it since that day. ***CD Tr, Plt. Appx. p 257a-258a.*** GLC is identified as the motor carrier in Corey's December 1995 log book. ***Appx. p 119b-146b.*** Furthermore, it is undisputed that GLC's name and permit number were displayed on the side of his truck at the time of the accident. ***CD Tr, Plt. Appx. p 261a; Appx. p 81b-84b.*** Corey heard Bill Bateson tell his brother to have GLC's name and permit numbers placed on the Drielick trucks several months before the accident. ***CD Tr, Plt. Appx. p 260a-262a.***

Corey worked for Drielick Trucking and received his wages from his brother. ***CD Tr, Plt. Appx. p 265a.*** Corey never received any payment or checks from GLC or GLL. ***CD Tr, Plt. Appx. p 265a.*** Corey believed that GLC and GLL were the same company. ***CD Tr, Plt. Appx. p 257a-258a.*** **The payments for the loads delivered by Corey for GLC were made to Drielick Trucking, not to specific drivers**. See ***Appx. p 147b-158b.***

BILL BATESON

In 1995, Bill Bateson was President, co-owner, and a full-time employee of GLC until February 1996. ***BB Tr II, Appx. p 20b, 30b; Appx. 71b-74b; Appx. 159b-168b.*** He described his

job duties as "pretty much anything." ***BB Tr II, Appx. p 15b.*** Bateson dispatched the drivers for their load assignments, ***BB Tr II, Appx. p 15b,*** worked in the shop, ***BB Tr II, Appx. p 15b,*** and filed 1995 and 1996 GLC applications for operating authority with the State of Michigan, ***Appx. 71b-74b.*** The application identifies Bill Bateson as the sole owner of GLC. ***Appx. 71b-74b.*** Bateson was also responsible for making sure that the trucks and trailers were covered by GLC's insurance policy, ***BB Tr II, Appx. p 17b,*** signed the checks issued to the drivers for deliveries, ***BB Tr I, Plt. Appx. p 377a,*** and solicited owner/operators to work for GLC, ***BB Tr II, Appx. p 19b.*** **Bateson was never employed by GLL.** ***BB Tr II, Appx. p 27b.*** **In fact, GLL did not have any employees.** ***JB Tr II, Plt. Appx. p 431a.***

Bateson acknowledged that he may have talked to Roger Drielick about terminating his lease agreement with Sargent Trucking and coming to work for GLC. ***BB Tr II, Plt. Appx. p 17b.*** He also admitted that Roger Drielick may have given him a copy of the old lease with Sargent Trucking to use as a format for drafting a lease with GLC. ***BB Tr II, Plt. Appx. p 19b.*** However, Bateson insists that his ex-wife handled the paperwork for leases. ***BB Tr II, Plt. Appx. p 17b.*** Bill Bateson never told Roger Drielick that Jamie Bateson was responsible for handling the lease paperwork. ***Plt. Appx. p 389a-398a; Plt. Appx. p 399a-424a.*** Bill Bateson's testimony was very vague and evasive about whether he believed Drielick's truck was leased to GLC. ***BB Tr I, Plt. Appx. p 375a; BB Tr II, Appx. p 19b.***

Bateson claims he thought the Drielick trucks were under lease to Sargent Trucking at the time Mario and he were dispatching loads to Drielick Trucking based on an alleged conversation with Kevin Beech. ***BB Tr I, Plt. Appx. p 375a, 379a.*** Bateson also claims that the loads that were dispatched to Drielick from November 1995 through the date of the accident were "brokered" to Sargent Trucking to deliver because GLC did not have any of its own trucks available. ***BB Tr I,***

Plt. Appx. p 371a; ***BB Tr II, Appx. p 20b, 27b.*** Furthermore, Bateson claims that Beech authorized him to contact drivers directly with any load assignments that GLC/GLL wanted to broker/assign to Sargent Trucking. ***BB Tr II, Appx. p 17b-18b, 20b, 25b-26b; BB Tr I, Plt. Appx. p 373a.*** **There is no evidence that GLL ever brokered any loads to Sargent, which were dispatched to Drielick Trucking for delivery after Roger Drielick terminated his lease with Sargent in October 1995**. See *AH Tr, Appx. p 52b, 61b, 65b, 69b*, confirming that the Sargent lease with Drielick Trucking was terminated several months prior to the January 1996 accident.

Bateson claims that he did not authorize Drielick to have decals with GLC's name and permit number placed on the Drielick trucks. **However, Roger Drielick testified that GLC's name and permit numbers were on all three Drielick trucks, which regularly picked up load assignments at GLC's yard in Linwood and that Bill Bateson saw the GLC decals on the Drielick truck on numerous occasions prior to the accident, but never said anything about them**. *RD Tr II, Plt. Appx. p413a.* **Bateson never told Roger Drielick to have the decals removed**. *RD Tr II, Plt. Appx. p413a.*

JAMIE BATESON

In 1995, Jamie Bateson was attending college full-time working on her teaching degree. ***JB Tr II, Plt. Appx. p 427a.*** During that time, she worked part-time doing the finance and payroll work for GLC. ***JB Tr I, Appx. p 35b-36b***. She began working as a full-time teacher in November 1995 for Saginaw Township School District. ***JB Tr I, Appx. p 35b.***

She testified that her ex-husband, Bill Bateson, and the other dispatcher, Mario, were responsible for GLC's day-to-day trucking operations. ***JB Tr I, Appx. p 36b.*** Jamie Bateson admitted that Bill Bateson was the President of the company for a time and was authorized to solicit drivers to lease equipment to GLC. ***JB Tr II, Plt. Appx. p 430a-431a.***

GLL was allegedly a "broker" which reportedly hired independent trucking companies to transport loads under the trucking company's operating authority. **Jamie Bateson testified that GLL did not have any employees**. *JB Tr II, Plt. Appx. p 431a*. GLC and GLL were located in the same building, and GLL did not have its own telephone number or listing in the phone book. *JB Tr I, Appx. p 39b, 41b; JB Tr II, Plt. Appx. p 433a*. GLL did not have any sign or identification on the building. *JB Tr I, Appx. p 39b, 41b; JB Tr II, Plt. Appx. p 433a*. Jamie Bateson was not responsible for handling the day-to-day operations or brokering the loads. Bill Bateson and Mario were allegedly responsible for brokering the loads **even though they were not employees of GLL**. *JB Tr II, Plt. Appx. p 430a, 435a*. Jamie reportedly handled the paperwork for any loads that were brokered to other trucking companies. *JB Tr II, Plt. Appx. p 432a*.

If GLL brokered any loads to Sargent Trucking in January 1996, there would be some form of a broker agreement confirming this arrangement and paperwork between GLL and Sargent Trucking confirming the amount paid to Sargent for the load and a record of payments made to Sargent for the delivery. *JB Tr II, Plt. Appx. p 432a-434a*. **Furthermore, Sargent Trucking would have paid Drielick Trucking for the deliveries physically made by the Drielick trucks, not GLC or GLL**. *JB Tr II, Plt. Appx. p 433a-434a; AH Tr, Appx. p 58b-59b*. **Not surprisingly, GLL does not have any such paperwork to support the claim that the loads dispatched to Drielick Trucking from November 1995 to January 1996 were brokered by GLL to Sargent Trucking, Drielick Trucking, or any other trucking company**. *JB Tr II, Plt. Appx. p 433a-434a*.[7] The evidence shows that loads were delivered for GLC under its operating authority.

[7]GLL did broker some loads to Sargent Trucking in Sept/Oct 1995 when Drielick's trucks were under lease to Sargent, the records of which are included with Ex. 1 to Empire's 1st Request for Admissions to Sargent which is in the Court file. See *Appx. 251b-318b, ROA# 335, 12/19/05; ROA# 201, 12/19/05; ROA# 236, 12/19/05, respectively*. There is

Jamie Bateson admitted that GLL issued the checks to Drielick Trucking, but she does not know which trucking company the loads were hauled for. ***JB Tr II, Plt. Appx. p 438a, 441a***; ***Appx. p 147b-158b***. Jamie Bateson did not have any contact with anyone from Drielick Trucking, and as such, she does not have any personal knowledge about whether GLL brokered loads to any trucking company that used Drielick Trucking to make deliveries. ***JB Tr II, Plt. Appx. p437a***. The fact that GLL made out checks to Drielick Trucking, ***Appx. p 147b-158b***, for delivering the loads transported from November 1995 through January 1996 (***Appx. 85b-112b, 113b-118b***), proves that the loads were not brokered to Sargent and that the deliveries were not made under any lease between Sargent and Drielick Trucking. If the loads had been brokered to Sargent, GLC/GLL would have paid Sargent, not Drielick Trucking.

AMY HOWLETT

Amy Howlett was Manager of the Sargent Trucking Safety Department in 1995 & 1996 and was in charge of all equipment leases. ***AH Tr, Appx. 52b-54b***. She explained that if Sargent received a load from a broker like GLL, Sargent Trucking would have records of payments from the broker for the loads. ***AH Tr, Appx. p 58b-59b***. Furthermore, Sargent Trucking would have paid Drielick Trucking for such loads, not the broker. ***AH Tr, Appx. p 59b; JB Tr II, Plt. Appx. 434a***. Amy Howlett confirmed that Sargent's lease with Drielick Trucking was terminated several months before the accident. ***AH Tr, Appx. 52b, 61b, 65b-66b***.

Sargent Trucking has no record of receiving any payments from GLC/GLL for any loads delivered by Drielick Trucking from mid-October 1995 through February 1996. In December 2005, Empire served Sargent Trucking with a request to admit that the only checks it issued to Drielick Trucking for any loads transported by Drielick Trucking from 1995 through

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no record of any load brokered by GLL to Sargent that was delivered by Drielick Trucking after Drielick terminated

January 12 1996 were issued before November 1995. See Empire's Request for Admissions to Sargent, which were filed with the trial court on December 19, 2005. See ***Appx. p 251b-278b, ROA# 335; Appx. p 279b-298b, ROA# 201; Appx. p 299b-318b, ROA# 236***. Sargent Trucking did not respond to Empire's request to admit which means that the requests are deemed admitted. MCR 2.312(B)(1), (D)(1). The fact that all payments made by Sargent to Drielick Trucking were before November 1995 is consistent with Roger Drielick's and Amy Howlett's testimony that Drielick's lease with Sargent was terminated in October 1995.

Lastly, Amy Howlett testified that **Sargent's dispatcher**, Kevin Beech, would have contacted Drielick Trucking for any loads brokered to Sargent, not the dispatcher for GLC or GLL. ***AH Tr, Appx. p 59b, 69b-70b***. This refutes Bill Bateson's claim that the loads he and Mario dispatched to Drielick were brokered to Sargent. Howlett also confirmed that there would have been a written lease between Sargent and Drielick Trucking if Drielick delivered any loads for Sargent that were brokered from GLC or GLL. ***AH Tr, Appx. p 65b***.

STANDARD OF REVIEW

The construction, interpretation, and application of an unambiguous insurance contract is a question of law for the Court, which is reviewed *de novo*. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348; 596 NW2d 190 (1999).

LAW AND ARGUMENT

I. A Lease Must Be Implied Between Drielick Trucking And Great Lakes Carriers Based On The Facts Of This Case And Federal Public Policy Underlying Applicable Federal Motor Carrier Regulations.

Garnishee Defendants do not dispute that federal regulations contain certain requirements for authorized motor carriers, which lease vehicles for their use. See 49 CFR 376.11; 49 CFR

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his leases with Sargent in October 1995.

376.12.[8] These federal regulations require that an authorized motor carrier performing authorized transportation services may do so only under certain conditions, one of which is a written lease granting exclusive use of the equipment and meeting the requirements of 49 CFR 376.12. See 49 CFR 376.11(a). The lease must be made between the authorized carrier and the owner of the equipment, must state a specific duration for the lease, and must grant exclusive possession and responsibilities for the possession, control, and use of the equipment to the authorized carrier. See 49 CFR 376.12(a), (b) and (c). The lease must also state that the authorized carrier assumes complete responsibility for the operation of the equipment for the duration of the lease. 49 CFR 376.12(c)(1). The regulations also require the lease to include statements about the authorized carrier's responsibility to maintain insurance coverage for the leased equipment. 49 CFR 376.12(j).

In *Wilson v Riley Whittle ,Inc*, 145 Ariz 317; 701 P2d 575 (1985), the Arizona Court of Appeals addressed the legal effect of the absence of a written lease between the truck owner and the authorized carrier. The *Wilson* Court also discussed the history and public policy behind the adoption of the federal regulations requiring authorized carriers to execute written leases. Specifically, it stated:

> In the 1950s, it was common practice for trucking companies to attempt to immunize themselves from liability by using independent truckers or by denominating the regular drivers as independent contractors. To combat this practice and to ensure that the motoring public was adequately protected, Congress enacted 49 USC 11107 [now 49 USC 14102]. See *Transamerican Freight Lines, Inc v Brada Miller Freight systems, Inc*, 423 US 28; 96 S Ct 229; 46 L Ed 2d 169 (1975). **The federal statute and the regulations promulgated thereunder protect the motoring public by requiring the trucking company [authorized carrier] to have control of and be responsible for the operation of leased vehicles. The trucking company is required to enter into a trip lease with the truck driver, to inspect the lease vehicle, and to provide insurance coverage on**

[8] At the time of the accident on 1/12/96, the 1995 Code of Federal Regulations applicable. The sections referring to leasing of vehicles by authorized carriers were 49 CFR 1057.11 & 49 CFR 1057.12. The sections have since been renumbered, and these regulations are now found at 49 CFR 376.11 and 49 CFR 376.12. The provisions in the current Code of Federal Regulations have not changed except to update references to renumbered statutes and regulations.

any lease vehicle. 49 USC [14102]; 49 CFR [376][9]

The purpose of the regulations is stated in *Transport Indemnity Company v Carolina Casualty Insurance Company*, 133 Ariz 395; 652 P2d 134 (1982):

> "Congress intended to put the use and operation of leased equipment on a parity with the use of equipment owned by the authorized carrier and operated by its own employees, in effect making the driver of the leased unit a statutory employee of the lessee." 133 Ariz at 397.

Federal law creates an irrebuttable presumption that the lessor is the employee of the motor carrier. [citation omitted] Under the Federal statutes and regulations the liability of the trucking company [authorized carrier] is no greater than that which exists under the doctrine of respondeat superior. [citation omitted]

The cases are uniform in holding that the absence of a written trip lease is legally irrelevant. In *Cox v Bond Transportation, Inc*, 53 NJ 186; 249 A2d 579 (1969), cert den 395 US 935; 89 S Ct 1999; 23 L Ed 2d 450, the court stated:

> "The regulations described above have the force and effect of law. **A franchised interstate carrier cannot evade them by making an oral or written lease with an owner-operator of equipment** for a trip, for a day or for an indefinite period, **which attempts to exclude or to limit their application**. When such a carrier engages an owner-operator of a tractor intending to have him transport goods for it on the public highways and interstate commerce ... **the regulations must be deemed included in their contract**." 249 A2d at 586-87.

(Emphasis added.) *Wilson, supra* at 320-321.

See also *Prestige Casualty Co* v *Michigan Mutual Ins Co*, 99 F.3d 1340 (CA 6 1996), a Michigan case from the 6th Circuit. The *Wilson* Court noted that in *Ronish v St Louis*, 621 F2d 949, 951 (CA9 1980), the Federal Court of Appeals also held that the absence of a written lease was immaterial and that the lessee carrier could not avoid liability based on its failure to comply with federal regulations. *Wilson, supra* at 321. The lessee was liable as a matter of federal law. *Id.* citing *Ronish, supra*.

In *Wilson*, it was undisputed that there was no written lease executed prior to the accident. However, consistent with prior state and federal cases, **the *Wilson* Court held that the absence of**

[9] Formerly, 49 USC § 11107; 49 CFR §1057, respectively.

a written trip lease was legally irrelevant. It stated that at least part of the reason for the failure to sign the trip lease rested on the authorized carrier whose loose internal procedures allowed the driver to pick up the load without presenting a signed trip lease. *Wilson, supra* at 321. The Court further stated that:

> **The public policy expressed by 49 USC [14102] and 49 CFR [376] would be wrongfully frustrated if we were to allow Riley Whittle [the authorized carrier] to evade the liability imposed upon it by the federal statute and regulations by asserting that a written trip lease was a condition precedent to any contract between the parties and to responsibility on its part. Instead, that policy demands that Riley Whittle [the authorized carrier] is liable as a matter of law**. (emphasis added.) *Wilson, supra* at 321.

The carrier could not argue that it had no control over the driver's conduct because the purpose of 49 USC 11107 [now 14102] and the federal regulations promulgated thereafter was to make the authorized carrier responsible for and in control of leased vehicles. *Wilson, supra*, citing *Transamerican Freight, supra*. In other words, an authorized carrier cannot avoid liability for a driver's alleged negligent operation of a leased vehicle by failing to comply with federal law requiring a written lease and then denying the existence of a lease. *Id.*

Moreover, if the evidence establishes the existence of an oral lease, the authorized carrier cannot rely on Federal regulations to argue that there is no lease agreement. See *Wilson, supra*. See also *Fuller v Reidel*, 159 Wis 2d 323; 464 NW2d 97 (1990) (The Wisconsin Court of Appeals refused to dismiss the defendant carrier based on the absence of a written trip lease, holding, consistent with *Wilson*, that the absence of a written trip lease is legally irrelevant in determining whether the carrier is subject to liability. *Fuller, supra*. See also *Zamalloa v Hart*, 31 F3d 911 (CA9, Ariz, 1994) in which the Federal Court of Appeals reaffirmed that **an authorized carrier could be subjected to liability based on an oral lease between the carrier and the owner of the truck**. **In fact, the *Zamalloa* Court held that the necessary "statutory relationship" can be**

formed via an oral lease between the carrier and the vehicle owner even before the driver picks up the cargo. *Zamalloa, supra* at 917.

In the instant case, Drielick Trucking began hauling loads for GLC in November 1995, two months before the January 1996 accident. See ***Appx. p 113b-118b, Invoices to GLC & Appx. p 85b-112b, Delivery Receipts on GLC's forms***. There is at least one check to Drielick Trucking drawn on GLC's account. ***Appx. p 147b-158b***. Therefore, GLC was aware of and allowed Drielick Trucking to pick up and deliver loads **under its operating authority** for two months before the accident without executing a written lease. Moreover, under *Wilson, supra*, federal regulations and public policy prohibit GLC from denying the existence of a lease with Drielick or avoiding its liability for the accident. The existence of an oral lease, even though such does not comply with federal regulations, is sufficient to establish liability on the part of GLC.

Plaintiffs also erroneously argue that *Wilson, supra* has no application in the instant case because *Paul v Bogle*, 193 Mich App 479; 484 NW2d 728 (1992), a Michigan case, allegedly "declined to follow" the *Wilson* case. However, the holdings in *Wilson,* supra and *Paul, supra* address different issues and are not in conflict. In fact, the *Paul* case supports Empire's argument that the absence of a written lease is legally irrelevant in the instant case.

In *Paul*, there was a written lease between the authorized carrier and the owner-operator of the semi-truck as required by federal law. The preliminary issue in the case was whether the truck driver was the "statutory employee" of the authorized carrier, which would then subject the carrier to liability for the driver's negligent operation of the truck. In deciding this issue, the Court discussed whether the applicable federal regulations requiring a written lease with a definite lease term granting exclusive possession, control, and responsibility for the leased equipment to the carrier are intended to preempt state law regarding a lessee's liability under the lease. *Paul, supra*

at 483-484. The *Paul* Court, quoting *Empire Fire & Marine Ins Co v Guaranty National Ins Co,* 868 F2d 357, 362 (CA10, 1989), discussed the public policy underlying the federal regulations as follows:

> "In the past, the use by truckers of leased or borrowed vehicles led to a number of abuses that threatened the public interest and the economic stability of the trucking industry. In some cases, ICC-licensed carriers used leased or interchanged vehicles to avoid safety regulations governing equipment and drivers. In other cases, the use of non-owned vehicles led to public confusion as to who was financially responsible for accidents caused by those vehicles.
>
> In order to address these abuses, Congress amended the Interstate Commerce Act to allow the ICC to prescribe regulations to insure that motor carriers would be fully responsible for the operation of vehicles certified to them. In response to this mandate, the ICC [now the Federal Motor Carrier Safety Administration(FMCSA)] promulgated regulations requiring that every lease entered into by an ICC-licensed carrier must contain a provision stating that the authorized carrier maintain 'exclusive possession, control, and use of the equipment for the duration of the lease,' and 'assume complete responsibility for the operation of the equipment for the duration of the lease.' Further, the ICC requires that all ICC-certified carriers maintain insurance or other form of surety 'conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles' under the carrier's permit. [Citations omitted.]" *Paul, supra* at 484-485.

The *Paul* Court rejected the defendant carrier's argument that state law should be applied without reference to the federal regulations, stating that this has occurred in only a few cases. The Court further stated that in a few other cases, a hybrid approach (which the Court does not define) was taken. It is in reference to this "hybrid approach" that the *Wilson* case is cited. The Court did not expressly reject the *Wilson* case. Rather, it stated that the majority of the cases adopt a "statutory employee" approach to analyzing motor carrier liability, which it explained as follows:

> [T]he statutory employee approach holds an ICC carrier
>
> "vicariously liable for injury, caused by the driver's negligent operation of a vehicle when three factors coincide: (1) the carrier does not own the vehicle; **(2) the carrier operates the vehicle, under an "arrangement" with the owner, to provide transportation subject to the [Interstate Commerce] Commission's jurisdiction**; and (3) the carrier does not literally employ the driver. In these circumstances, the driver is held to be the *constructive* or

'statutory employee' of the carrier; and, in consequence of this fiction, the doctrine of *respondeat superior* imposes upon the carrier a vicarious liability for the negligence of its 'employee' the driver. [Emphasis in [italics in] original.]"

Wilcox [*v Transportation Freight Lines, Inc*, 371 F2d 403 (CA6, 1967)], which is relied upon by Wolverine [the authorized carrier], is cited as one of the few decisions to rely solely upon state law to determine a carrier's liability. However, we decline to follow *Wilcox*. We would note that the Sixth Circuit no longer adheres to that ruling, see *Johnson v SOS Transport, Inc*, 926 F2d 516 (CA6 1991), and that, in any event, given the nature of our federal system, the decisions of that court are not binding upon us. However, we are persuaded by the subsequent, if somewhat tardily rendered, opinion of the ICC that rejects those decisions that have sought to impose liability solely on the basis of its regulations.

This is not to say that we reject those decisions of other courts that have given weight to the ICC regulations. We do not believe that the statutory employee doctrine, adopted by a substantial number of jurisdictions, imposes liability solely on the basis of the ICC regulations. Rather, **the doctrine appears to impose liability under state law, after creating the fictional relationship existing between the driver and the ICC carrier. We agree with such a reading of the duties imposed by the regulations**.

Given that Michigan has not yet considered this issue, we conclude that state law is the appropriate law to consider, with due deference to the duties imposed and the relationships created by the federal regulations. We accordingly adopt that portion of the statutory employee rule that creates a fictional employment relationship between the driver and carrier and then look to the applicable state law for the imposition of liability. . . . *Paul, supra* at 487-488. (Emphasis in bold and underline added.)

In explaining the statutory employee rule, the Court referred only to **an "arrangement" between the carrier and the owner, not a written lease**. *Paul, supra.* In *Paul*, it was undisputed that the subject lease complied with federal regulations, so the issue addressed in *Wilson, supra* and *Zamalloa, supra* regarding whether liability may be based on an oral lease was never addressed in the *Paul* case. However, it is clear under *Paul, supra,* that Michigan Courts agree with and apply the public policy underlying the federal regulations which will not allow an authorized carrier to avoid liability for accidents involving the negligent operation of leased trucks.

It is undisputed that GLC was an "authorized carrier" with operating authority from both

the State of Michigan and the ICC at the time of the accident. Therefore, GLC was subject to compliance with federal regulations requiring a written lease. No written lease was executed between Drielick Trucking and Great Lakes Carriers because Roger Drielick relied on Bill Bateson to prepare and finalize the paperwork, which he never did. See ***Plt. Appx. p 389a - 424a***. However, GLC's failure to comply with federal regulations does not negate the existence of an oral lease between GLC and Drielick Trucking or absolve GLC of financial responsibility for the accident. **The evidence establishes that an oral lease existed between GLC and Drielick Trucking**. The *Paul* case does not preclude such a finding and would certainly support finding that a statutory employment relationship existed between GLC and the Drielick Trucking drivers. Plaintiffs have failed to cite any legal authority, which would preclude a finding that an oral lease existed merely based upon the failure to comply with federal regulations requiring a written lease between the authorized carrier and the owner of the equipment.

GLC's argument that the Drielicks were hauling loads brokered by GLL to Sargent is unsupported by the evidence. **GLL did not have any employees, did not have its own telephone number or phone book listing, was located in the same building as GLC, and did not have any sign or identification on the building**. *JB Tr II, Plt. Appx. p 431a, 433a; BB Tr I, Plt. Appx. p 370a.* **In other words, GLL merely existed on paper and was an alter ego of GLC**. **If GLL brokered any loads to Sargent Trucking in January 1996, there would be some form of a broker agreement i.e. paperwork between GLL and Sargent Trucking confirming the amount paid to Sargent for the load and a record of payments made to Sargent for the delivery**. *JB Tr II, Plt. Appx. p 432a-434a.* **Furthermore, Sargent Trucking would have paid Drielick Trucking for the deliveries physically made by the Drielick trucks, not GLC or GLL**. *JB Tr II, Plt. Appx. p 433a-434a; AH Tr, Appx. p 58b-59b.* **Not surprisingly, GLL does**

not have any paperwork to support the claim that the loads dispatched to Drielick Trucking from November 1995 to January 1996 were brokered by GLL to Sargent Trucking, Drielick Trucking, or any other trucking company. ***JB Tr II, Plt. Appx. p 433a-434a.*** **The evidence shows that loads were delivered for GLC under its operating authority pursuant to an oral lease with Drielick Trucking**.

The first clause of the Business Use Exclusion does not require a lease. ***Plt. Appx. p 457a-458a.*** The plain, unambiguous language of the Business Use Exclusion provides that coverage is excluded, "while a covered 'auto' is used in the business of anyone to whom the "auto" is **leased or rented**."[10] (Emphasis added.) ***Plt. Appx. p 457a-458a.*** **The exclusion does not require that the "covered auto" be under *written* lease**. See ***Plt. Appx. p 457a-458a.*** Furthermore, **Michigan law does not require that there be a written lease in order to impose liability on the lessee of a motor vehicle**. Under Michigan law, an "owner" of a motor vehicle is defined as "any person, firm, association, or corporation renting a motor vehicle or having the exclusive thereof, **under a lease or otherwise**, for a period that is greater than 30 days." (emphasis added.) See MCL 257.37. See also MCL 257.401(3). **The absence of a *written* lease between Drielick Trucking and GLC is irrelevant with respect to whether the Business Use Exclusion applies to this case**. The trial court did not expressly rule that there was an oral lease between Roger Drielick and GLC, but rather assumed arguendo the existence of a lease in order to reach the ultimate question of whether the Drielick truck was being used in the business of GLC at the time of the accident. See 7/12/10 Opinion, ***Plt. Appx. p 70a.***

In the trial court, GLC argued that the subject truck was not under any written or oral lease

[10] The 2004 Court of Appeals decision held that the Business Use Exclusion is unambiguous and must be enforced as written. See ***Plt. Appx. p 49a-56a.***

to GLC, but rather that the truck was under lease to Sargent Trucking and that GLL was brokering the loads delivered by the Drielicks to Sargent Trucking. However, the evidence does not support GLC's argument. The evidence establishes unequivocally that Roger Drielick had orally terminated his lease with Sargent Trucking months prior to the subject accident. ***Plt. Appx. p 389a-398a, 399a-424a, Appx. p 49b-70b, 79b-80b***. The truck had GLC decals with its name and permit number on its doors at the time of the accident. ***Appx. 79b-80b***. Bill Bateson acknowledged that he told Corey Drielick to come pick up a load at the GLC yard. ***Plt. Appx. p 365a-388a; Appx. 11b-32b***. Furthermore, GLL/GLC paid Drielick Trucking directly for delivery of loads from November 1995 through January 1996 and did not issue any payment to Sargent Trucking, which establishes that the loads were not being brokered to Sargent Trucking. See ***Appx. p 85b-112b; 113b-118b.*** See also ***JB Tr II, Plt. Appx. p 432a-434a; AH Tr, p 58b-59b***. GLC has used Bill Bateson's self-serving failure to finalize the written lease paperwork to argue that no lease existed, which is simply not true, and contrary to public policy under the federal regulation of motor carriers.

GLC tried to deny that Bill Bateson had authority to enter into leases in its behalf. However, as the President and owner of GLC and the person in charge of its day-to-day operations, Bill Bateson was cloaked with GLC's **actual and apparent authority** to lease Roger Drielick's trucks. Apparent authority arises where the acts and appearances lead a third person to reasonably believe that the agent (Bill Bateson) has authority to act and bind the principal (GLC). *Alar* v *Mercy Memorial Hospital*, 208 Mich App 518, 529 NW2d 318 (1995). A principal (GLC) who has placed an agent (Bill Bateson) in a situation such that a person of ordinary prudence, conversant with the business usages and the nature of the particular business is justified in assuming that the agent is authorized to perform a particular act on behalf of the principal is estopped to deny the

agent's authority. *Atlantic Die Casting Co*, v *Whiting Tubular Products*, 337 Mich 414, 60 NW2d 1741 (1953). Generally, the authority of an agent is co-existent with the business entrusted to his care. *Atlantic, supra.* Apparent authority of the agent is to be gathered from all the facts and circumstances. *Alar, supra.* Bill Bateson represented himself to Roger Drielick as the owner of GLC, and Roger Drielick was justified in believing Bateson had the authority to enter into leases on behalf of GLC. ***Plt. Appx. p 389a-98a, 399a-424a.***

As previously discussed, **the requirement that there be a written lease whenever an "authorized carrier"[11] uses non-owned equipment for commercial transportation purposes is a federal regulatory requirement, which has nothing to do with the application of the unambiguous terms of the Empire policy**. See 49 CFR §1057.11a (1995); 49 CFR §376.11a; 49 CFR §376.12 (1996)[12]; *Paul,* supra. The law will imply a the existence of a lease to prevent a carrier from avoiding liability by failing to comply with federal regulations. However, Empire's rights and obligations are governed by the express terms of the insurance contract, including the Business Use Exclusion, **which does not require a written lease**.

Federal regulations also require the motor carrier/lessee to display its name and permit number on the truck. 49 CFR §1057.11(c)(1995); 49 CFR § 376.11(c)(1)(1996). The

[11] An "authorized carrier" is "[a] person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of 49 USC § 10921, 10922, 10923, 10928, 10931, or 10932". See 49 CFR § 1057.2a (1995).

[12] Effective 1/1/96, the ICC Termination Act of 1995 abolished the ICC. All new grants of authority for motor carriers to engage in interstate commerce are now issued by the Department of Transportation through the Federal Motor Carrier Safety Administration. The Act's savings provision provides that all certificates of authority in existence at the time of the ICC's abolition continue to be valid and all regulations that were in effect on the date of the transfer of function from the ICC to the Secretary of Transportation "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Board, any other authorized official, a court of competent jurisdiction, or operation of law". Pub. L No 104-88, 109 Stat. 941, § 204(a)(2) (1995). Former 49 USCA §11107 has been reenacted substantially unchanged as 49 USC §14102 except that the Code section now refers to the former ICC as the Secretary of Transportation. The former ICC regulations which govern equipment lease agreements, 49 CFR §1057.11 *et seq.* have been renumbered at 49 CFR §376.1. See *Upshaw* v *Hale Intermodal Transportation Co*, 480 SE2d 277, 279 (1997).

overwhelming evidence establishes that GLC's name and permit number were displayed on the subject truck was leased to and being used in the business of GLC at the time of the accident.

1. Roger Drielick testified that he terminated his lease agreement with Sargent Trucking in October 1995 and subsequently leased his three trucks to GLC pursuant to the statements and representations of Bill Bateson who represented himself as the owner of GLC. ***Plt. Appx. p 389a-398a, 399a-424a.***

2. Bill Bateson was the President and full-time employee of GLC in 1995 at the time that Roger Drielick agreed to lease his trucks to GLC. ***Appx. 159b-168b.***

3. Bill Bateson gave Roger Drielick the "cab card" issued by the State of Michigan to GLC with its operating authority and was told to carry it in the trucks. ***Plt. Appx. p 245a-290a, 389a-398a, 399a-424a.***

4. Roger Drielick was told by Bill Bateson to have the name and permit number for GLC placed on each of his three trucks, which he did. ***Plt. Appx. 389a-398a, 399a-424a.***

5. Roger Drielick's trucks were dispatched by Bill Bateson and/or Mario, the other dispatcher for GLC, to pick and transport loads for GLC and were given forms to use as delivery receipts with the name and address of Great Lakes Carriers. ***Plt. Appx. p 245a-290a, 365a-388a, 389a-398a, 399a-424a. Appx. p 11b-32b, 85b-112b.***

6. The billing invoices from Drielick Trucking indicate that the loads were transported on behalf of GLC. ***Appx. p 113b-118b.***

7. The loads were picked up at GLC's yard in Linwood, Michigan. ***Plt. Appx. p 245a-290a, 389a-398a, 399a-424a.***

8. Corey Drielick was dispatched by Bill Bateson on the morning of the accident to pick up a load at the GLC yard and transport it to a business customer in Cheboygan, Michigan. ***Plt. Appx. p 245a-290a, 365a-388a. Appx. p 11b-32b.***

9. Corey Drielick was en route to GLC's yard at the time of the accident and did not stop or intend to stop for any personal reason or use of the truck. ***Plt. Appx. p 245a-290a.***

10. The name and permit number for Great Lakes Carriers was on the side of Corey Drielick's truck at the time of the accident. ***Plt. Appx. p 245a-290a, 389a-398a, 399a-424a. & N.***

11. GLC is identified as the motor carrier in the log books used by Corey Drielick for the loads that he was dispatched by Bill Bateson and Mario to pick up and transport on behalf of GLC. ***Plt. Appx. p 245a-290a; Appx. p 119b-146b.***

12. Corey Drielick's log books from December 1995 identify GLC as the carrier for whom

he was delivering loads. ***Appx. p 119b-146b.***.

13. Drielick Trucking did not have its own operating authority to transport loads for hire and had to lease the trucks to other trucking companies with operating authority. ***Plt. Appx. p 389a-398a, 399a-424a.***

There is no question that the subject Drielick truck was under lease to GLC at the time of accident. Therefore, GLC's liability insurance carrier is obligated to pay the consent judgments entered against the Drielicks, not Empire. However, even if the Court were to determine that the lease with Sargent Trucking was still in effect at the time of the accident and that Corey Drielick was en route to pick up a load brokered to Sargent, the Empire Business Use Exclusion would still apply. The only difference would be that Sargent's liability insurance would be implicated rather than GLC's liability insurance carrier.

II. It Would Have Been Proper For The Court Of Appeals To Reverse The Trial Court's Erroneous Ruling Based On The Second Part Of The Business Use Exclusion On The Grounds That Corey Drielick's Truck Was Being Used In The Business Of GLC, To Whom It Was Leased, At The Time Of The Accident.

The Business Use Exclusion in the Empire Non-Trucking Policy contains two parts, which by use of the word "or", are separate and independent. See ***Plt. Appx. 457a-458a.*** If either part of the exclusion applies, coverage is barred under the Empire policy. The Court of Appeals held that coverage is excluded under the first part of the Business Use Exclusion. See ***11/20/12 COA Opinion, Plt. Appx. p 85a-94a.*** The Court of Appeals did not address whether coverage is excluded under the second clause of the Business Use Exclusion. If this Court were to determine that there may be coverage under the first part of the Business Use Exclusion, Garnishee Defendant Empire would still be entitled to reversal of the trial court's erroneous decision based on the second part of the Business Use Exclusion in the Empire policy (denoted in bold and underlined type), which provides in pertinent part:

B. EXCLUSIONS

This insurance does not apply to any of the following:

* * *

13. **BUSINESS USE**

"Bodily injury" or "property damage" while a covered "auto" is used to carry property in any business or **while a covered "auto" is used in the business of anyone to whom the "auto" is leased or rented**. (Emphasis added.) ***Plt. Appx. p 457a-458a.***

The Empire policy is a **Non-Trucking Policy**. Such policies are frequently described as "bobtail" and/or "deadhead"[13] coverage. The meaning of the word "bobtail" in the trucking industry as distinguished from the context of insurance coverage is explained in *Prestige, supra*, which concerned a declaratory judgment action arising out of a Michigan accident involving a semi-truck leased to a motor carrier that was "bobtailing" at the time of the accident. The Court stated in pertinent part:

> "Bobtail" in trucking parlance is the operation of a tractor without an attached trailer. [Citations omitted]. **For insurance purposes**, however, it typically means coverage "only when the tractor is being used without a trailer or with an empty trailer, **and is not being operated in the business of an authorized carrier**." (Emphasis added.) *Prestige, supra* at 1343.

A truck that is traveling without a trailer en route to pick up a load for a lessee carrier at the time of the accident is being operated in the business of an authorized carrier therefore is not "bobtailing" for purposes of determining insurance coverage. See *Prestige, supra.*

The fact that the truck was "bobtailing"[14] without a trailer at the time of the accident is factually and legally irrelevant. The plain language of the second part of the Business Use exclusion **does not** state that the truck must be attached to a trailer or in the act of transporting property for it to be used in the furtherance of the carrier's business. See ***Plt. Appx. p 457a-458a.*** Furthermore, the applicable law interpreting this exclusion with respect to accidents involving

[13] "Deadheading" refers to a semi-truck hauling an empty trailer. In the instant case, it is undisputed that the subject truck was "bobtailing" i.e. the semi-tractor did not have any trailer attached.

[14] Empire's reference to "bobtailing" is intended to refer to the traditional meaning of the term and not intended to

"bobtailing" trucks, overwhelmingly holds that a truck which is bobtailing and not hauling cargo **may still be acting in furtherance of the business of the carrier for purposes of determining insurance coverage**.

The identical Business Use Exclusion was interpreted in *Empire Fire & Marine Insurance Co* v *Brantley Trucking, Inc.*, 200 F3d 679 (5th Cir. 2000), which involved a truck, which was bobtailing en route to the carrier's yard after having some routine maintenance performed. The Court held that the business use exclusion was unambiguous as a matter of law, and in analyzing its applicability, the Court stated:

> The portion of the exclusion which we are concerned with in this case "while the covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented[ ]"-**clearly refers to occasions when the truck is being used to further the commercial interests of the lessee**. **This was precisely the case here, where Harris was only biding his time while the cargo loaded, had the truck maintenanced, and was en route back to Blue Flash's yard to pick up the load when the accident occurred**. (Emphasis added.) *Brantley, supra* at 682.

In the instant case, the trial court erroneously concluded that merely because the Drielick truck had not yet reached the GLC yard, it was not furthering the business interests of GLC while under dispatch en route to the yard at the time of the accident. See ***Plt. Appx. p 63a-78a***. In *Brantley*, the truck was on its way to the yard to pick up a load after the driver had some routine maintenance done. The trailer had not been attached yet and was still in the process of being loaded. *Brantley, supra*. **There is no material difference between the facts in *Brantley* and the instant case**. Corey Drielick was on dispatch en route to the GLC yard to pick up the load at the time of the accident in furtherance of the business of GLC. Drielick was not engaged in personal business and was not off on a frolic. ***Plt. Appx. 245a-290a***. **The subject truck was within 1-2 miles of the GLC yard at the time of the accident, and by driving to the GLC yard to pick up**

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make any implication regarding whether there is coverage under the policy.

the load even though he did not reach the yard before the accident, he was using the truck to further the commercial interests of GLC. Therefore, the Business Use exclusion applies, and coverage is excluded under the Empire policy. Garnishee Defendant is entitled to reversal of the trial court's erroneous rulings, and the trial court should be directed to issue an Order granting the motion to quash the garnishments.

In *Auto-Owners Ins Co v Redland Ins Co*, 549 F3d 1043 (CA6 2008),[15] which is a Michigan case, the 6th Circuit Court of Appeals addressed the question of whether the truck driver, Gale, was "in the business of" Everhart Trucking at the time of the accident for purposes of determining whether the coverage was excluded under the nontrucking "bobtail" insurance policy issued by Redland. *Id.* at 1044. The subject truck, owned by R & T Trucking, was under lease to Everhart Trucking. *Id.* The facts were as follows:

> David Gale, an R & T employee, drove one of the trucks leased to Everhart. On the morning of June 22, 2004, Everhart directed Gale to pick up a load of coiled steel in Zanesville, Ohio, and to deliver it to a manufacturer in Grand Rapids, Michigan. Gale completed the delivery late that evening. At 11:17 p.m., Gale called Everhart's main line, leaving a voice mail to the effect that he had finished his delivery, he was going to find a place to sleep and he would 'probably wake up early and drive off some more to get [to] Gary–East of Chicago.' In the same message, he asked Everhart not to make his next appointment 'real early.' . . . Not long after he left this message . . . Gale apparently fell asleep at the wheel and collided with another vehicle, killing the driver. *Redland, supra* at 1044..

The aforesaid facts reveal that Gale had not formally received an assignment for the next morning at the time of the accident. However, he anticipated receiving another load in Gary–East of Chicago because he had frequently done so in the past. In other words, Gale was driving in the direction of his next presumed, but not confirmed, dispatch at the time of the accident. *Redland, supra.*

[15] The trial court cited 522 F Supp 2d 891 (WD Mich 2007) in its Opinion and Order, but while the trial court was deliberating, the 6th Circuit affirmed the District Court ruling.

The 6th Circuit, affirming the Western District, held that Gale was "in the business" of Everhart at the time of the accident. It stated that, "He was not engaged in some frolic and detour, heading somewhere for his own purposes and no other." Gale was looking for a place to sleep, because he was required by federal regulations to go off duty for a certain period of hours and sleep before he would be eligible to pick up a new load. The Court held that gaining the required amount of sleep in order to be eligible for his next assignment served the commercial interests of Everhart as did driving in the general direction of his next anticipated assignment. *Redland, supra.* at 1045-1046 citing *Greenwell v Boatright*, 184 F 3d 490, 491-492 (CA6 1999); *Mahaffey v Gen Sec Ins Co*, 543 F3d 738, 742-743 (CA5 2008). Therefore, Gale was in the business of Everhart at the time of the accident. In reaching its decision, the 6th Circuit noted that Auto-Owners had not cited any legal authority to the contrary. *Redland, supra.* The Court also noted in dicta that the exclusion applied to a truck under assignment (i.e. dispatch) on its way to pick up a load. *Id.* 1046.

In the instant case, Corey Drielick was not just driving in the direction of an anticipated assignment. He had spoken with Bill Bateson on the telephone, at which time he was given an assignment (i.e. dispatched) and was en route to pick up the load at GLC's yard at the time of the accident. ***Plt. Appx. p 245a-290a.*** Corey Drielick was not engaged in a frolic or detour and was not heading somewhere for his own purposes and no other, and there is no evidence that he was engaged in personal business. The trial court improperly speculated that Corey Drielick was free to engage in personal business at the time of the accident because he was not required to arrive at GLC's yard at any specific time. However, what Corey could have done is irrelevant. What matters is what he was doing at the time of the accident, which was that he was on dispatch en route to GLC's yard to pick up a load for delivery in furtherance of GLC's business. **The accident occurred within 1-2 miles from the GLC yard**. The fact that the truck was "bobtailing" and had

not yet picked up the load is irrelevant for purposes of whether the Business Use exclusion applies to exclude coverage under the Empire policy. See *Redland, supra; Brantley, supra.*

In *Mahaffey, supra*, a 2008 Fifth Circuit Court of Appeals case, the subject truck hauled a load from Kentucky to Louisiana, and after dropping off the load, the driver called the carrier's dispatcher, at which time he was told to take the rest of the night off and call in the morning to see if the carrier had a load for him. *Id.* at 739. The driver drove the truck "bobtail" to a truck stop where he ate dinner, watched TV, showered, and played some slot machines over the course of 6-7 hours. The driver decided to go to a motel rather than sleep in his cab because of a roof leak. On the way to the motel, the driver was involved in an accident. *Id.* The nontrucking "bobtail" insurance provided that "**the insurance does not apply to ... [a] covered 'auto' while used to carry property in any business ... [or] a covered 'auto' while used in the business of anyone to whom the 'auto' is rented**." *Id.* at 740.

The Fifth Circuit reaffirmed that the aforesaid exclusion is unambiguous and must be enforced as written. *Id.* at 741. The Court noted, "That 'contractual language may, on occasion, pose difficult factual applications ...' and that the parties disagree as to coverage, does not create an ambiguity." *Id.* at 741. In analyzing the case, the Court stated that the driver was not heading home, but rather was on standby for further deliveries at the time of the accident and that although the driver was "free to go where he pleased" in the interim, he still had to stay in proximity to where he was anticipating picking up his next load. Therefore, the Court held that the truck was furthering the commercial interests of the carrier at the time of the accident, and the nontrucking "business use" exclusion applied to exclude coverage under the bobtail insurance. *Mahaffey, supra.* at 742-743. The *Mahaffey* Court noted that its decision was consistent with the "commercial interest" test articulated in *Brantley*. *Mahaffey, supra* at 743.

The *Mahaffey* case, like *Brantley*, involved application of the identical Business Use exclusion at issue in the instant case. The facts in the instant case are more compelling because Corey Drielick was already under dispatch pursuant to the phone call from Bateson. He was not merely killing time between load assignments and was not engaged in personal business. He was en route to pick up the load at the time of the accident.

In *Republic Western Ins Co v Williams*, 212 Fed Appx 235, (CA4, South Carolina, 1/10/07), ***Appx. p 319b-326b***, the Fourth Circuit Court of Appeals addressed a factual scenario, which is directly on point in the instant case. The subject truck was under lease to a carrier, PBX. The undisputed facts were that:

> PBX typically employed four local drivers at any given time, and it required these drivers to come to its terminal and obtain their assignments personally from the city dispatcher. PBX gave its drivers one assignment at a time, and when a driver was sent to a shipyard, he had to return to the PBX terminal to get the next assignment.
>
> **Williams, like all PBX local drivers, was paid only for time spent hauling containers. Although PBX did not require Williams to arrive at the terminal at any specific time for his first assignment of each day, he normally went to the PBX terminal with the expectation that work was immediately available. PBX permitted Williams to drive the Freightliner to and from work everyday and to park it overnight in a lot on a side street about one mile from his home. PBX did not direct Williams' route between his home and the PBX terminal, and it did not direct the routes he took while hauling containers**.
>
> PBX required its local drivers to perform a pre-trip inspection before starting and driving a truck. Williams performed his daily pre-trip inspection every morning in the lot near his home where he parked the Freightliner. Williams testified that the Freightliner was "for business, not for pleasure," J.A. 272, and that he only drove it for business; when he was not conducting business, he parked the truck. (Emphasis added.) *Williams, supra* at 237-238.

On April 30, 2003, **Williams was driving the truck en route from the overnight parking lot to the PBX terminal in anticipation of receiving his first assignment of the day when he was involved in the subject accident**. *Id.* at 238. Since Williams had not yet arrived at the PBX terminal, he was "bobtailing" at the time of the accident. *Id.* The Court held that the truck

was being used in the business of PBX at the time of the accident. *Id.* ***Appx. p 319b-326b.*** The Court noted that there was a DOT investigation and that the accident was noted as DOT recordable, which further supported a finding that the truck was being used in the business of PBX. If the driver was on his own time and in his own vehicle, there is no need for a DOT investigation. *Id.* at 240. ***Appx. p 319b-326b.***

Likewise, in the instant case, Corey Drielick was on dispatch en route to pick up a load from GLC's yard at the time of the accident. He left in the truck from his mother's home where he kept the truck when it was not in use and headed directly to GLC's yard. Corey was not on personal business when the accident occurred. See ***Plt. Appx. p 245a-290a.*** He was using the truck in furtherance of the commercial interests of GLC. See ***Appx. p 319b-326b.*** See also *Redland, supra; Brantley, supra.*

Planet Ins Co v *Transport Indemnity*, 823 F 2d 825 (CA9 1987), is also directly on point. The truck owner's bobtail insurance excluded coverage while a covered auto is "used in the business of anyone to whom the [truck] is rented." *Id.* at 286. The case involved a "trip lease", which dispatched the leased truck to pick up a load of wallboard in Nevada and deliver it to California. The accident occurred while the driver was **en route to pick up the load in Nevada and before the carrier's signs had been affixed to the semi-tractor doors**. The Court held that the "trip lease" began when the semi-tractor was delivered into the possession of the driver by the carrier, at which time the truck was **under dispatch**. Therefore, the accident occurred while the truck was being used "in the business of anyone to whom the [truck was] rented" within the meaning of the subject insurance policy's business use exclusion. *Id.* The Court rejected the argument that the exclusion did not apply because the driver had not yet picked up the load. *Id.* The Court also rejected the argument that the truck was not being used in the lessee carrier's

business at the time of the accident, noting that the lessee offered no evidence to establish that the truck was being used for any purpose other than the lessee's business at the time of the accident.

In the instant case, the trial court erroneously failed to address the application of the *Planet* case, which is directly on point. The *Planet* case involved identical exclusionary language in the policy, and the truck was on dispatch en route to pick up a load at the time of the accident as was Corey Drielick in the instant case. It is clear that Corey was using the truck in the furtherance of GLC's business at the time of the accident and that coverage is excluded under the Empire Business Use exclusion. *Planet, supra.*

Hartford Ins Co of Southeast v *Occidental Fire and Casualty Co of North Carolina*, 908 F2d 235 (CA7 1990), involved a Wisconsin accident that occurred when a leased truck was bobtailing en route to pick up a trailer that had been dropped off for repairs, which were necessitated while the truck was en route to make a delivery. **The Occidental policy contained a Business Use exclusion identical to the subject Empire policy**. *Id.* The Court ruled that the exclusion is unambiguous and negated coverage for the accident because the truck was being used in the lessee's business at the time of the accident, stating:

> **The phrase "in the business of an ... organization to whom the automobile is rented" clearly refers to occasions when the truck is being used to further the commercial interests of the lessee**. That was the case here. Dunn had not completed his delivery for Lykes, remained in Fort Wayne at Lykes' command, and was en route to pick up his trailer in order to complete his delivery of the orange juice when the collision occurred. The possibility that Rich's interest coincided with those of Lykes does not diminish the benefits Lykes received from Dunn's actions; Dunn was furthering Lykes' commercial interests at the time of the collision, and **Occidental's policy exclusion therefore applies**. (Emphasis added.) *Hartford, supra.*

The *Hartford* Court also made it clear that the exclusion applies even when a truck is bobtailing to pick up a load and is not limited to periods when the tractor is hauling goods *Id.* at 239.

The trial court in the instant case misapplied the holding in *Hartford*, stating:

> In the present case, the cab was merely on its way to pick up the trailer and the load to be delivered for Great Lakes. Drielick was not under specific orders by Great Lakes to be at the yard at any particular time or to go straight to the yard. Drielick was free to run an errand or do other personal business prior to picking up the load as he was not being paid for his journey to Great Lakes' yard. Therefore, **since Drielick's truck would not be under the control of Great Lakes until it coupled with the trailer at the yard**, the reasoning of Hartford supports the conclusion that the business exclusion in the Empire policy did not apply and the bobtailing insurance was in effect for the accident. (Emphasis added.) Slip Op. at p 7-8, ***Plt. Appx. p 63a-78a.***

The trial court's analysis erroneously relies on principles pertaining to whether a trucker is an employee of the carrier or an independent contractor. It is undisputed that the Drielicks were independent contractors with trucks under lease to GLC. The "control" standard does not determine whether a covered "auto" was being "used in the business of anyone to whom it is leased or rented." What Corey Drielick might have done and what he was free to do have no relevance whatsoever to the issue at hand. **The applicable standard in *Hartford* is whether the truck "is being used to further the commercial interests of the lessee."** *Hartford, supra.* at 239. The undisputed evidence shows that Corey Drielick had received a call to pick up a load from Great Lakes and that he was on dispatch en route to GLC to pick up the load at the time of the accident. The truck was clearly being used in furtherance of GLC's commercial interests at the time of the accident. *Hartford, supra.* Furthermore, Corey Drielick was a statutory employee of GLC at the time of the accident. *Paul, supra.*

In *Liberty Mutual Ins Co* v *Connecticut Indemnity Co*, 55 F3d 1333 (CA7 1995), the 7th Circuit held that an Indiana accident which occurred while the truck was en route to pick up a trailer was being used in the lessee's business. Therefore, there was no coverage under the owner's policy pursuant to an identical Business Use exclusion. The driver picked up a loaded trailer and drove to a truck stop near his home where he uncoupled the trailer and drove home for the evening

with the lessee's permission. The following morning the driver was involved in an accident en route to pick up the loaded trailer. The Court concluded that the driver was acting in furtherance of the business of the motor carrier/lessee at the time of the accident. *Liberty, supra.*

In the instant case, the trial court misinterpreted and misapplied the holding in *Liberty*, stating:

> The facts in the present case are different from the facts in Liberty because Drielick was on his way to pick up the load, while the driver in Liberty had already picked up the load and had uncoupled his truck so he could sleep at home that evening. In Liberty, the Federal Court found that even though the cab wasn't attached to the trailer and the cab was being driven on a personal matter (i.e. going home to sleep and returning the next day), the cab and driver were still under the direction and control of Gra-Bell. In the present case, Great Lakes told [Drielick] to come to its yard to pick up the trailer and deliver a load of goods. He was not given a specific time and the delivery did not begin until the trailer was attached because he would only be paid form the time the trailer was attached to the time it was delivered. The reasoning of Liberty supports the conclusion that Drielick's truck was independent until it reached its delivery starting point and the Empire bobtailing insurance was in effect for this accident. Slip Op. at p 9, ***Plt. Appx. p 63a-78a.***

Contrary to the trial court's analysis, in *Liberty*, the Federal Court relied on the holding in *Hartford*, which sets a standard of being in furtherance of the commercial interest of the lessee. The *Liberty* Court does make reference to Gra-Bell's ultimate responsibility and control. However, the decision does not turn upon respondeat superior theory. The truck in *Liberty* was already under dispatch and in the middle of delivery at the time the driver unhitched to drive home to sleep. The *Liberty* Court noted that the driver **was not being compensated for his idle time, but the driver still owed responsibility for the trailer load to Gra-Bell**. This fact did not prevent the Court from finding that coverage was excluded under the bobtail policy pursuant to the business use exclusion.

In the instant case, contrary to the trial court's analysis, Corey Drielick was already under dispatch en route to GLC at the time of the accident. The trial court's statement that Corey was not being paid for the portion of his trip, which entailed driving from his home to GLC's yard has no

legal relevance to the question of whether coverage is excluded under the Empire policy. First, Drielick Trucking was paid a percentage (75%) of revenue from each load without reference to the timing of pick-up and delivery or mileage for the trip, which is not disputed by GLC. Second, the applicable case law does not turn upon whether the driver is being paid for his time when the accident occurs, but rather the question is whether the truck is being used in furtherance of the commercial interests of the lessee carrier at the time of the accident. See *Brantley, supra; Redland, supra.* In the instant case, it is undisputed that the truck was under dispatch en route to pick up the load from GLC in furtherance of the business of GLC at the time of the accident. Therefore, coverage is excluded.

In *Greenwell, supra,* the accident occurred in Kentucky while a truck was bobtailing to a motel after the driver left his trailer for unloading. The subject non-business insurance policy contained an identical Business Use exclusion. The truck was under lease to KLLM and was pulling a load from Florida for the lessee. The driver dropped off the trailer to be unloaded, but was unable to complete the unloading because of congestion at the dock. The driver decided to leave the trailer at the dock and drive to a local motel to spend the night before returning the following day to complete delivery. The collision occurred en route to the motel. 6th Circuit held that the truck was still engaged in the lessee carrier's business while driving to a motel for the night even though he was not hauling a trailer. *Id.* 492. See also *St Paul Fire Ins Co* v *Frankart*, 69 Ill 2d 209, 370 NE2d 1058 (1977).

There is no question that **traveling to pick up a load is an integral part of the trip**. Trucks regularly "bobtail" or "deadhead" to pick up cargo at the direction of a motor carrier. It is illogical to conclude that these movements are not part of the motor carrier's business of carrying property or that the truck is not being used to further the commercial interests of the lessee. Corey

Drielick was on dispatch en route to pick up a load at the direction of Bill Bateson on behalf of GLC when the accident occurred. GLC had the right to control his actions pursuant to 49 CFR § 1057.12(C)(1)(1995); 49 CFR §376.12(c)(1996); *Hartford, supra*. Therefore, the truck was acting in furtherance of the business of GLC at the time of the accident, and coverage is excluded.

The trial court's reliance on *Engle* v *Zurich American Ins Group*, 230 Mich App 105, 583 NW2d 484 (1996) (see ***Plt. Appx. p 63a-78a***) in ruling against Empire was also misplaced. In *Engle, supra*, the Court of Appeals found the exclusion, which was **similar to but not identical to the one at issue here**, ambiguous and therefore construed it against the insurer. In the instant case, the 2004 Court of Appeals opinion, relying on several other cases addressing identical policy language, held that the Empire Business Use exclusion is clear and unambiguous and **must be enforced as written**. ***Plt. Appx. p 52a***.

Furthermore, the facts in *Engle* which led to the Court of Appeals to hold that the truck was not being used in the business of the carrier to whom it was rented are significantly different. In *Engle, supra*, the trucker had finished his delivery, unhitched his trailer, and considered the work day to be over, at which time he drove to a restaurant, ate dinner, and left. The accident occurred when he was en route back to the carrier's yard to get his personal vehicle.

In the instant case, the Corey Drielick was not engaged in personal business, but rather was en route to GLC to pick up a load for delivery in response to a phone call from Bateson, which placed him "under dispatch" at the time of the accident. There is no question that the truck was being used in furtherance of the business of GLC at the time of the accident. The *Engle* case which involves a different and ambiguous exclusion is inapplicable.

In *MGM Transport Corp v Cain*, 496 SE2d 822 (NC App 1998), the truck was owned by defendant Holmes, driven by defendant Butterfield, and leased to Plaintiff MGM Transport under

an Independent Contractor Agreement. Butterfield was "bobtailing" from his home to the MGM terminal to pick up a load at the time of the accident. Holmes had liability insurance with Northland, which contained a "Non-Trucking Use" endorsement, which excluded coverage for the tractor "while use in the business of anyone to whom the [tractor] is rented." The Court noted that the exclusionary language at issue has been construed under respondeat superior principles, and as such, the question is whether the driver is furthering the business interests of the motor carrier/lessor (the statutory employer under federal regulations) at the time of the accident. The Court held that the tractor was being used in the business of MGM at the time of the accident, and therefore, coverage was excluded under the non-trucking policy. The Court specifically noted that at the time of the accident, the driver was **acting under instructions from MGM to come pick up a load at the terminal**. *MGM Transport, Inc, supra.*

Likewise, in the instant case, Corey Drelick was acting under instructions from GLC to come pick up a load at its yard at the time of the accident. *MGM Transport* is directly on point. There is no question that the Drielick truck was under lease to GLC and furthering the business of GLC at the time of the accident. Therefore, the second clause in the Business Use Exclusion applies, and coverage is excluded under the Empire policy. Therefore, Empire is entitled to reversal of the trial court's erroneous ruling under the second clause in the Business Use Exclusion, and the writs of garnishment should be quashed. While the Court of Appeals did not rule under this part of the exclusion, it nevertheless reached the right result, and its ruling should be affirmed. *Peninsular Const Co v Murray*, 365 Mich 694, 699; 114 NW2d 202, 204 (1962)(A court's ruling should not be disturbed where it reached the right result, albeit for the wrong reason.)

III. The Court Of Appeals Properly Reversed The Trial Court's Erroneous Ruling That Corey Drielick's Truck Was Not Being Used To Carry Property In A Business At The Time Of The Accident Within The Meaning Of The First Part Of The Empire "Business Use" Exclusion And That The Empire Policy Was In Effect And Applicable At The Time Of The Accident.

The Court of Appeals properly reversed the trial court's erroneous ruling based on the first clause in the Empire Business Use Exclusion, which provides (denoted in bold and underline):

> **B. EXCLUSIONS**
> **This insurance does not apply to any of the following:**
> * * *
> 13. **BUSINESS USE**
>
> **"Bodily injury" or "property damage" while a covered "auto" is used to carry property in any business** or while a covered "auto" is used in the business of anyone to whom the "auto" is leased or rented. (Emphasis added.) ***Plt. Appx. p 457a-458a.***

The first part of the "Business Use" exclusion applies while the truck is "being used to carry property in **any** business." It does not require the truck to be under lease to that business and is not limited to when the truck is **engaged in the act** of transporting property. **The exclusion is much broader and applies whenever the truck is being used in furtherance of carrying property in any business**. See ***Plt. Appx. p 457a-458a.*** The Drielick truck was on dispatch en route to GLC to pick up a load at the time of the accident, and as such, it was being used in furtherance of carrying property in a business. Therefore, coverage is excluded under the Empire policy.

In *Brantley Trucking, Inc, supra*, which involved the **identical** Business Use exclusion at issue in the instant case, the an insurance coverage dispute concerned an accident in which a truck that was "bobtailing" en route to pick up a loaded trailer at the lessee's terminal after having some routine maintenance performed on the truck. *Id.* The trailer had not been attached yet and was still in the process of being loaded. Nevertheless, the Court held that the truck was being used in

furtherance of the business of the lessee carrier. *Id.* Defendant Brantley owned the truck, which was leased to Blue Flash Express. Empire issued a "non-trucking" insurance policy to Brantley which contained the subject "Business Use" exclusion. Reliance National had issued a policy to Blue Flash for coverage as a transporter for trucking operations. Reliance argued that the truck was not being used to carry property in any business because it was bobtailing and not physically carrying property at the time of the accident and that Empire was liable for coverage for the accident. *Id.*

Reliance based its argument on the language of a similar but different exclusion in a non-trucking policy addressed in *Assicuarazioni Generali, S. PA* v *Ranger Ins Co*, 64 F3d 1979 (5th Cir 1995), which excluded coverage where the truck was "engaged in the business of transporting property for others." The *Brantley* Court distinguished the exclusion in the *Assicuarazioni Generali* policy, stating that it required that the truck **actually be engaged in transporting property at the time of the accident**, which is **"significantly different"** from the Empire policy, which merely states that coverage is excluded "while a covered 'auto' is used to *carry property* in any business. . ." (Emphasis in original). *Brantley, supra* at 682-683. In other words, *Brantley* made it clear that the subject exclusion in the Empire policy **does not** require that the truck actually be engaged in transporting property at the time of the accident. *Id.*

The *Brantley* Court's interpretation and distinction of the Empire Business Use exclusion from the exclusion in the *Assicuarazioni Generali* case is consistent with *Carriers Ins Co v Griffie*, 357 F Supp 441 (WD Penn 1973), which involved an insurance coverage dispute where the truck driver had been directed by the carrier's dispatcher to pick up a load for the carrier on that day and to have the equipment inspected at a garage before picking up the load. While at the inspection station, the truck ran over someone's foot. *Id.* at 442. The insurance policy at issue

excluded coverage "**while the automobile or any trailer attached thereto is used to carry property in any business**." (Emphasis added.) *Id.* at 441. The exclusion in *Griffie* contained a separate provision excluding coverage while the truck is "**engaged in the business of transporting property by automobile for others**", which the *Griffie* Court did not find applicable and disregarded for purposes of determining the coverage issue. Therefore, the insurance policy at issue in *Griffie* clearly distinguished the actual act of transporting property from use of the truck "to carry property in any business." *Id.* at 641.

The *Griffie* Court expressly found that the provision excluding coverage "**while the automobile or any trailer attached thereto is used to carry property in any business**" **was applicable and excluded coverage even though the truck was not handling cargo at the time of the accident**. *Id.* It stated:

> **The mere fact that no cargo was being handled at the particular moment when the accident occurred does not mean that the equipment [truck] was not "used to carry property in any business." It was regularly so used to carry property in the carrier's business as a trucker**. If the intent had been to extend coverage except when the equipment was actually hauling a load, it would not have been difficult to express such an intention clearly. In the absence of return loads, there is often much empty movement by common carriers, which they of course seek to minimize but can never entirely avoid. **Likewise equipment often moves empty to a shipper's dock to pick up a load. In fact that was in substance what was being done here when the accident occurred. It can not successfully be contended that incidental empty movements are not part of a common carrier's business of carrying property**. (Emphasis added.) *Griffie, supra* at 442-443.

The trial court in the instant case failed to address each part of the Empire Business Use exclusion separately and also misinterpreted and misapplied the relevant case law. The trial court also erred in denying reconsideration on this issue. The only case addressed by the trial court, which references the interpretation of the first part of the exclusion is *Brantley*. The trial court stated:

In Brantley there was a written lease to haul cargo for Blue Flash express. In addition, the

truck was being used to further Blue Flash's business as it drove from the yard to the mechanic to have the truck serviced before heading back to the yard to haul the Blue Flash load. The court found that the "business use" exclusion was in effect. In the present case, the bobtailing truck was merely on the way to the yard. It had not yet begun furthering the business of Great Lakes at the time of the accident. The reasoning of Brantley supports the conclusion that the business use exclusion was not in effect in the present case. Slip Op at p 12, ***Plt. Appx. p 63a-78a.***

The trial court failed to acknowledge the undisputed fact that pursuant to the telephone conversation between Corey Drielick and Bill Bateson, **the Drielick truck was under dispatch en route to pick up a load and was only 1-2 miles away from the yard at the time of the accident**. ***Plt. Appx. p 245a-290a.*** Likewise, in *Brantley*, the truck was bobtailing en route to the yard after having some routine maintenance performed at the time of the accident. The facts in *Brantley, supra*, are analogous to the instant case.

The trial court also ignored the plain language of the first part of the exclusion, which does not require that the truck is actually being used to carry property in GLC's business or that it be under a lease. The exclusion merely provides that coverage is excluded "**while a covered "auto" is used to carry property in any business**." See ***Plt. Appx. p 457a-458a.*** It is undisputed that the truck was regularly used to carry property in a business. ***Plt. Appx. 245a-290a, 389a-398a, 399a-424a, 365a-388a. Appx. 11b-32b, 85b-112b, 113b-118b, 119b-146b.*** The Drielick trucks were under oral lease[16] to GLC at the time of the accident, and they were regularly used to carry property for GLC. However, for purposes of the first part of the exclusion, it is irrelevant whose business is being furthered as long as the truck is being used for a business purpose. Therefore, regardless of whether Corey was under dispatch to GLC or was picking up a load GLL was brokering to Sargent Trucking, which Empire denies, **the Drielick truck was on dispatch en route to pick up a load in furtherance of carrying property in a business (i.e. not for**

[16] Bill Bateson/GLC had never done the paperwork to finalize the written lease. However, the first clause of the

personal use) at the time of the accident. See *Griffie, supra.* See also *Brantley, supra.* As such, the first part of the Business Use Exclusion applies to bar coverage in this case, and the writs of garnishment issued against Empire are invalid. The trial court erred as a matter of law in holding that the Empire policy was applicable and that the motion to quash the garnishments should be denied. Therefore, the Court of Appeals properly ruled that Garnishee Defendant is entitled to a reversal of the trial court's Opinions and Orders and that the Business Use Exclusion precludes coverage and the writs of garnishment as a matter of law. See ***11/20/12 COA Opinion, Plt. Appx. p 85a-94a.***

RELIEF REQUESTED

WHEREFORE, Garnishee Defendant Empire respectfully requests that this honorable Court AFFIRM the Court of Appeals decision holding that there is no coverage under the Empire policy and that the writs of garnishment issued to Empire be quashed as invalid as a matter of law.

Respectfully submitted,

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business use exclusion does not require the existence of a lease, and the second clause does not require a written lease.